Land Deeds as Treaties: The New Zealand Experience

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Vincent O'Malley

The Treaty of Waitangi has been subjected to an enormous amount of historical scrutiny since its signing in 1840. In recent times the supposedly noble and unique nature of this document portrayed in much of the earlier literature has tended to be supplanted by more sober analyses which emphasise the Waitangi Treaty as part of an older and more pragmatic colonial policy.[1]

Yet while the Treaty is now being placed in its proper international context, its uniqueness is still often assumed in at least one respect. It is assumed to be the only treaty signed between the Crown and Maori. There have, of course, been some exceptions to this. In a 1980 article Claudia Orange suggests that the great meeting of chiefs held at Kohimarama in 1860 resulted in a kind of 'covenant' or 'fuller ratification' of the original Waitangi agreement, with some tribes which had not been involved in the earlier treaty also committing themselves for the first time.[2] Yet on the whole, as Richard Boast suggests, the tendency of New Zealand historiography has been to draw a sharp distinction between 'the Treaty' and other kinds of arrangements entered into between Maori and the Crown - notably land sale deeds or 'agreements' like that which allowed for a railway line to be constructed through Maori land in the central North Island in the 1880s.[3]

Boast is right I believe in suggesting that this kind of rigid nomenclature ignores the reality of a more 'piecemeal and gradual expansion of effective government' in New Zealand than a literal reading of the Waitangi Treaty (or at least its English version) conveys. Prominent Crown agents such as Donald McLean certainly viewed the extension of real as opposed to nominal sovereignty as being a concomitant of the extinguishment of native title. In

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[1] M.P.K. Sorrenson, 'Treaties in British Colonial Policy: Precedents for Waitangi', in W. Renwick (ed.) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts*, Wellington: Victoria University Press, 1991, p.29.
[2] C. Orange, 'The Covenant of Kohimarama: A Ratification of the Treaty of Waitangi', *New Zealand Journal of History*, vol.14, no.1, 1980, p.77.

this sense 'land sale deeds' were indeed viewed as a form of treaty. But while it is correct to draw some parallels between such arrangements and the treaties entered into with the first nations of North America, Boast arguably paints only one half of the picture in describing both as involving 'little more than cessions in exchange for reserves and protection of hunting and fishing rights'.[4]

With respect to North America, several secondary sources suggest that the first nations took quite a different and altogether more significant understanding from such treaties. And certainly, in the case of New Zealand, ceding sovereign rights to their lands and other affairs does not appear to been uppermost in the minds of Maori chiefs when entering into various arrangements with the Crown. Indeed, more often it would appear that Maori interpreted early agreements as confirming rather than extinguishing their rights. In this sense it might be said that neither the Crown nor Maori saw land sale deeds as merely land sales, but nor was there any mutuality of understanding as to what such arrangements did mean.

Such arguments, of course, derive heavily from the reports and associated literature of the Waitangi Tribunal - a quasi-judicial body charged with determining the extent of Crown culpability for any alleged infractions of the Treaty of Waitangi. As many scholars have pointed out, the Tribunal's highly politicised role in the settlement of contemporary Maori land claims has helped to revolutionise New Zealand historiography, encouraging a radical review of our colonial past in which the Maori perspective is for the first time brought to the fore.[5] This is history from below, and if its inherent

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[3] R. Boast, 'The Law and Maori', in P. Spiller, J. Finn and R. Boast, *A New Zealand Legal History*, Wellington: Brooker's, 1995, p.133.
[4] ibid.
[5] M.P.K. Sorrenson, 'Towards a Radical Reinterpretation of New Zealand History: The Role of the Waitangi Tribunal, in I.H. Kawharu (ed.), *Waitangi:: Maori & Pakeha Perspectives of the Treaty of Waitangi* , Auckland: Oxford University Press, 1989. pp.158-178; A. Ward, 'History and Historians Before the Waitangi Tribunal: Some Reflections on the Ngai Tahu Claim', *New Zealand Journal of History*, vol.24, no.2, 1990, p.163; A. Ward, 'Historical Method and Waitangi

subversiveness has long proven too much for large sections of the Pakeha population, even some historians now find themselves uncomfortable with the methodological implications of such an approach.

From this perspective the Tribunal's most recent report has proven perhaps its most contentious. In its *Muriwhenua Land Report*, released in 1997, the Tribunal accepted the contention advanced by the claimants that Muriwhenua Maori in the pre-1865 period had not intended to sell their land to the settlers or to the Crown, but had instead made this available for settlement in the expectation of forging an enduring relationship of mutual benefit to both parties.[6]

The Muriwhenua claim has proven one of the most keenly contested cases to be investigated by the Tribunal, with the Crown advancing evidence throughout which it has suggested throws considerable doubt on the so-called 'tuku whenua' thesis advanced by the claimants. There has been a surprising level of support for their viewpoint amongst the historical community in the wake of the report's release, with some historians criticising the Tribunal's alleged blanket rejection of this documentary evidence in favour of tribal (and generally oral) tradition.

My purpose in traversing this subject briefly is not to debate the merits of the Tribunal's findings in this case, or even the epistemological approach adopted in arriving at the conclusions which it did, but rather to suggest an aspect of all this in which there may be slightly more agreement amongst historians - and indeed between historians and the Waitangi Tribunal.

Tribunal Claims', in M. Fairburn and W.H. Oliver (eds.), *The Certainty of Doubt: Tributes to Peter Munz*, Wellington: Victoria University Press, 1996, p.140; P. McHugh, 'Law, History and the Treaty of Waitangi', *New Zealand Journal of History*, vol.31, no.1, 1997, pp.38-57.

[6] Waitangi Tribunal, *Muriwhenua Land Report*, Wellington: GP Publications, 1997.

Few historians would dispute the contention that in the period prior to 1865 - during which more than half of the New Zealand land mass was legally alienated to the Crown - its agents held out certain inducements to Maori in order to encourage them to enter into land transactions with the Crown. And nor would most historians dispute the notion that, in entering such arrangements, Maori held certain expectations as to the future advantages to be derived from making land available for Pakeha settlement. As Professor W.H. Oliver, one of the strongest critics of the *Muriwhenua Report* says, '[a]n immediate cash return...was not the only or even the main advantage Maori sellers expected, and were led to expect, from the sale of their land'.[7] (Whether these Crown inducements constituted contractual promises is, of course, another matter, and one to which I shall return shortly).

Firstly, though, I will traverse some of the background to all this. In the early 1840s the true extent and significance of the land guarantee made to Maori in article two of the Waitangi Treaty proved a subject of considerable debate amongst officials both in London and New Zealand.[8]

One school of thought - supported by the New Zealand Company - advocated the so-called wastelands theory inspired by the ideas of Emerich Vattel and Thomas Arnold. In their view, indigenous societies could not, in all fairness, lay claim to lands which they had not actually cultivated or occupied.

By contrast, the humanitarian school, backed by the missionaries and their supporters, argued that Maori and other indigenous peoples were entitled to

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[7] W.H. Oliver, 'The Crown and Muriwhenua Lands: An Overview', Wai-45 record of documents, L7, p.24. For Oliver's critique of the Tribunal report see *New Zealand Books*, vol.7, no.2, 1997, pp.17-19; *New Zealand Herald*, 16 October 1997. Ashley Gould, a Crown historian involved in the same claim, also suggested that it was 'sometimes a practice of Crown agents to use the "bait" of future development while negotiating sales', and that Maori also held expectations of long term benefits arising from the transactions. A. Gould, 'Crown Purchases in Muriwhenua to 1865', Wai-45 record of documents, J4-B, pp.72-73. See also C. Geiringer and P. Wyatt, 'Issues Arising from the Evidence of Dr. A. Gould and F. Sinclair, Relating to Crown Purchases in Muriwhenua 1850-1865', Wai-45 record of documents, L5.

an unconditional property guarantee to all the lands which they claim to. And since early visitors to New Zealand shores (such as Robert FitzRoy in 1838) had reported that every acre of New Zealand was claimed by one tribe or another acceptance of this viewpoint would have a major impact on the potential colonisation of the colony.

Yet non-recognition of Maori title would have had equally drastic consequences. As Sir Robert Peel commented in 1848 'If the obligations of good faith vary with the military skill and prowess of the parties to a Treaty, the New Zealanders have put in a claim to be respected which it has become prudent on our part to recognize'.[9]

The problem was that not all Imperial officials, safely removed from the consequences of their decisions, appreciated this logic. Earl Grey's 1846 instructions to his namesake Sir George Grey were deemed so inflammatory by some northern newspapers in the colony that they censored the pertinent sections, fearful of the Maori reaction to news of the Crown's intention to take possession of all uncultivated or unoccupied lands.[10]

Realising the calamitous results of attempting to enforce the Colonial Secretary's instructions, Governor Grey instead successfully argued for and implemented an alternative means to the same end, involving the nominal recognition of Maori title to the so-called wastelands and an active land-purchase policy aimed at acquiring this for a 'trifling consideration'. Through the rigorous enforcement of Crown pre-emption, Maori would be prevented

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[8] Waitangi Tribunal, *The Ngai Tahu Report 1991,* Wellington: Brooker and Friend, 1991, vol.2, pp.252-253.
[9] Cited in P. Adams, *Fatal Necessity: British Intervention in New Zealand 1830-1847*, Auckland: Auckland University Press/Oxford University Press, 1977, p.245.
[10] C. Orange, *The Treaty of Waitangi*, Wellington: Allen & Unwin/Port Nicholson Press, 1987, p.109.

from dealing directly with settlers, allowing the Crown to acquire large land blocks ahead of the needs of settlement.[11]

Yet the Crown was hardly in a position to enforce any kind of policy on Maori - the key to its success instead lay in Grey's appreciation that many tribes would willingly provide land for settlement in the expectation that the real payment would come through other than monetary means: through the introduction of more settlers, providing new markets for their products and increasing the value of their reserves, through public works programmes, schools, hospitals, hostels and other perceived benefits of European settlement, along with continual Crown promises to protect Maori interests.

These policies were spectacularly successful, particularly during the term of Grey's first governorship. By 1865 some 20% of the North Island had been purchased by the Crown (mostly in more accessible coastal districts, such as Wairarapa, where 75% of the land passed to the Crown in the space of just 12 years).[12] In the south the figures were even more impressive, with 99% of the island acquired by the Crown - including more than 34 million acres purchased from the Ngai Tahu tribe for just over £14,750 and about 37,000 acres in reserves.[13]

Leaving aside for the moment the rather loaded historical debate as to why Maori 'sold' land during this period, it remains clear that there was no shortage of iwi willing to fall into line with Grey's policy of acquiring large land blocks in advance of settlement and at 'trifling' prices.

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[11] Governor Grey to Earl Grey, 15 May 1848, *British Parliamentary Papers (Colonies New Zealand)*, [1120], vol.6, pp.22-26.
[12] D.V. Williams, '"Te Kooti Tango Whenua": The Native Land Court 1864 to 1909', [draft report commissioned by the Crown Forestry Rental Trust, 1998], p.48; A. Ward, *National Overview*, (Waitangi Tribunal Rangahaua Whanui Series), Wellington: GP Publications, 1997, vol.1, p.56.
[13] Ward, *op.cit.*, p.56; Waitangi Tribunal, *Ngai Tahu Report*, vol.3, p.821.

What exactly was it that Crown purchase agents promised to encourage such a response? Walter Mantell, who completed negotiations for the 20 million acre Kemp block in 1848 later wrote privately that 'in making purchases from the natives I ever represented to them that though the money payment might be small, their chief recompense would lie in the kindness of the Govt. towards them, the erection & maintenance of schools & hospitals for their benefit & so on'.[14] After resigning his position as commissioner of Crown lands for Otago, Mantell was later to take up the issue of these unfulfilled promises with the Colonial Office. Asked as to the authority under which he had made these promises to Ngai Tahu, Mantell replied that:

> Lieutenant-Governor Eyre...impressed upon me the propriety of placing before the Natives the prospect of the great future advantages which the cession of their lands would bring them in schools, hospitals and the paternal care of Her Majesty's Government, and...I found these promises of great use in my endeavours to break down their strong and most justifiable opposition to my first commission, and in facilitating the acquisition of my later purchases, adding to the Crown lands an area nearly as large as England.[15]

Mantell added that he had not deemed it necessary to include these verbal promises in the various deeds of cession signed, having no grounds for fearing their non-fulfilment at the time. Grey's successor, Governor Gore Browne, to whom this matter was eventually referred for comment, concurred with Mantell, commenting that:

> I am satisfied that from the date of the Treaty of Waitangi, promises of schools, hospitals, roads, constant solicitude for their welfare and

[14] Mantell to J.J. Symonds, 21 August 1855. Cited in *Ngai Tahu Report*, vol.3, p.951.
[15] Cited in ibid., p.952.

> general protection on the part of the Imperial Government have been held out to the Natives to induce them to part with their land.[16]

Ngai Tahu clearly shared in these sentiments. In a remarkable letter to Parliament, written in 1873, the 'Committees of Tahupotiki' stated that 'in former days...the lands of this Island...were set apart as payment for schools houses and Hospitals, and the protection by the Government of the Maori people'.[17] These payments had not been received, the letter continued, and meantime the Pakeha had grown rich from the sheep and cattle which covered their land, along with the gold discovered upon it. In consequence of this they declared their intention to arrange a new division of the island, and the government was asked to 'give notice to the various runholders in the centre of the Island to remove their sheep &c. to the Coast'.

Remarkably, nearly thirty years after the first Crown 'purchase' of their lands (and thirteen years after the last), Ngai Tahu were repudiating these transactions on the basis of unfulfilled promises and a lack of reciprocity on the part of the Crown. Quite clearly they held a different understanding as to the nature of these arrangements from that espoused by the Crown. Even the self-appointed champion of Ngai Tahu rights in his later years, Walter Mantell, would not have perceived these arrangements as being open to repudiation. Pakeha did not need to be reminded that once the land was bought it was gone forever.

Continuing agitation from Ngai Tahu saw a royal commission appointed in 1879 to investigate any unfulfilled promises arising from the transactions. No doubt swayed by the evidence of Grey, Smith and Nairn reported that 'promises to establish schools and hospitals, and to promote their welfare generally' had been made during the course of negotiations and remained

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[16] Gore Browne to Colonial Secretary, 9 February 1857. Cited in ibid., p.953.
[17] 'The Ngai Tahu Tribe' to the Speaker of the House of Representatives and colleagues, 21 October 1873, Le 1/1874/121, National Archives, Wellington.

unfulfilled.[18] The former Governor had supported the evidence of Mantell, stating that it had been standard policy during his first governorship to issue such promises as part of land purchase negotiations.[19]

Not all Crown agents were in agreement on this point. Donald McLean, the Crown's chief land purchase commissioner in the 1850s, wrote with respect to Ngai Tahu that 'the terms of the original treaties or agreements for the cession of their lands have been strictly observed and fulfilled by the Government'.[20] Yet he himself had been the pre-eminent exponent of the collateral advantages school of land acquisition and regularly made sweeping promises to Maori during the course of his own negotiations.

To take one example. In November 1851 McLean completed the purchase of the 265,000 acre Ahuriri block, which along with Mohaka and Waipukurau constituted the earliest Crown acquisition in the district of Hawke's Bay. With just a few notable exceptions the Ngati Kahungunu tribe had not signed the Treaty of Waitangi in 1840. Local Maori had, however, from 1844 onwards sought to encourage large numbers of settlers to the district, even seeking unsuccessfully to have the Canterbury Association's proposed settlement located in their midst. As Te Hapuku put it, they wanted 'a large, large, large, very large town' of their own and were prepared to provide the land for it 'that we may soon have respectable English gentlemen'.[21]

Playing on this desire for settlers, McLean blocked Maori efforts to illegally lease their lands to the settlers, informing them that they would instead have to deal with the Crown. This was in their best interests, McLean explained, since only the Crown could bring large number of settlers to their district, and

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[18] Cited in *Ngai Tahu Report*, p.960.
[19] Evidence of Sir George Grey, MA 67/4, National Archives, Wellington.
[20] Cited in *Ngai Tahu Report*, p.953
[21] Te Hapuku to Governor Grey, 3 May 1851, *Appendices to the Journals of the House of Representatives*, 1862, C-1, p.313. Cited in V. O'Malley, 'The Ahuriri Purchase', (an overview

provide them with schools, hospitals, market places and the other long-term benefits to be derived from its active protection of their interests.

Ahuriri Maori were quick to respond to this. On 2 May the price for their land was settled upon - McLean informing local Maori that the paltry sum he was prepared to offer them was 'considering future advantages a really handsome one' - and the leading chiefs immediately wrote to Grey, informing him that they had given their home to McLean and requesting that the Governor should not 'delay and hesitate to send some Pakeha for our properties as this was the basis of our agreement in accordance to our lands'.[22]

Later they wrote to request a hospital, stating that there was much illness among them. McLean, though, continued to take umbrage at what he perceived was the unwarranted interference of the local CMS missionary William Colenso in negotiations, stating with respect to one issue that 'the natives [did not] require such advice when they are in treaty with the British Govt.'[23]

McLean's frequent use of the term 'treaty' when describing land purchase deeds negotiated with Maori appears to have been quite deliberate. As he commented in 1858:

> It is well ascertained that the New Zealand tribes regard their land as a National property, the cession of which when decided on, they prefer making as a National Act to Her Majesty, even while they are aware, that the sums to be realized by such cessions are inconsiderable. Nor do they generally attach so much importance to the pecuniary

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report commissioned by the Crown Forestry Rental Trust), Wai-201 record of documents, J10, 1995, p.109.

[22] Tareuha [sic - Tareha] and others to Governor, 2 May 1851. Cited in V. O'Malley, 'The Treaty of Ahuriri: Supplementary Evidence of Vincent O'Malley in Relation to the Ahuriri Purchase of 1851', Wai-201 record of documents, O2, p.7.

[23] McLean Journal, 11 November 1851. Cited in O'Malley, 'The Ahuriri Purchase', p.151

> consideration received for land held by them in common, as to the future consequences resulting from its alienation.[24]

The same point was reiterated by McLean's assistant Native Secretary, T.H. Smith, as well as by an 1856 board of inquiry into native affairs, which concluded that:

> More or less, every transfer of land may be looked upon as a national compact, and regarded as binding both parties to mutual good offices.[25]

McLean clearly regarded the land purchase policy developed under Grey of acquiring large land blocks ahead of the needs of settlement in terms of treaties ceding substantive sovereignty. Reassured by continual promises from the likes of McLean that both people would prosper together on the land, many Maori seemed to have perceived these agreements more in the light of power-sharing alliances, however. Even before the Ahuriri deed had been signed, for example, local Maori had requested that a Pakeha judge be sent to them yet persisted in dealing with matters according to their own customs and laws long after a resident magistrate had been appointed for the region.[26] They had wanted a judge, it seems, to control recalcitrant Pakeha, not to govern their own affairs.

Moreover, even after the block had supposedly been formally ceded to the Crown, Ahuriri Maori continued to occupy portions of it, running sheep, cultivating crops, and hunting and collecting traditional foods in the area.[27] Some settlers found their own runs subject to Maori occupation. This appears

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[24] Memorandum by the Native Secretary (McLean), 25 June 1858, *Appendices to the Journals of the House of Representatives*, 1860 E-1, p.15.
[25] Report of the Board of Inquiry on Native Matters, 9 July 1856, *British Parliamentary Papers (Colonies New Zealand)*, [2719], p.240.
[26] O'Malley, 'The Ahuriri Purchase', p.230.
[27] T. Walzl, 'Ahuriri Land Issues', Wai-201 record of documents, O10, 1997, p.19

to have been less a form of civil disobedience so much as a natural expression of how Ahuriri Maori perceived the nature of their relationship with the settlers. As they informed the local newspaper on more than one occasion, the settlers had been invited to Hawke's Bay to 'live together on the spot we have chosen as a common home'.[28]

Yet by the late 1850s the settlers (along with their half million sheep) had become numerically dominant in the region. Ahuriri Maori had received their large town in the form of Napier but found themselves increasingly excluded from the commercial opportunities it was supposed to provide them with. In 1859 one settler's home was pulled to the ground by Maori claiming ownership of the land. By 1860 Ahuriri Maori had announced their determination to resume possession of nearly 100,000 acres 'to exact rents from the settlers in occupation, or to drive their sheep across the line which they thought fit to mark off as the Queen's boundary and destroy the homesteads'.[29] Once again, apparently dissatisfied with the nature of their relationship with the settlers, Maori were seeking to modify the terms of a purchase supposedly concluded nearly a decade earlier.

Just as with the Ngai Tahu transactions, the terms of the Ahuriri purchase were eventually formally inquired into, this time by Parliament's Native Affairs Committee, in 1875. McLean, by this time Native Minister, was asked by one committee member, John Sheehan, 'what has been done in regard to the other promises made in the deed respecting sites for churches, hospitals, &c.'. In reply, McLean stated that:

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[28] *Hawkes Bay Herald, 10 October 1857.* Cited in ibid., p.47

[29] G.S. Cooper to McLean, 8 March 1860, *Appendices to the Journals of the House of Representatives*, 1862, C-1, p.349.

> The natives were merely told that such buildings were to be put up on this particular place, & that a Township was to be formed, but not for them.[30]

Yet as Sheehan retorted, why, if these things were not intended for Maori, as well as Pakeha, did he mention them? McLean's response that they wanted a 'European township' requires little comment. Clearly they had wanted a township for both peoples, not just Europeans, and McLean had used the prospect of one being established as an inducement throughout his negotiations.

In fact, when quizzed by the Smith-Nairn Commission concerning such promises, Grey had specifically pointed to Hawke's Bay as an example of where these had been made - a point he reiterated to Ahuriri Maori themselves on a visit to the district in 1877. Grey, by this time premier, reminded Hawke's Bay Maori of his first visit to the area in the early 1850s, when he had told them that providing land for settlers would be for their benefit:

> that you would get protection from your enemies, and that an end would be put to your wars among one another. I told you of a good many things - carts, horses, ploughs, cattle, property, which you had not then - that you would get schools for your children, and doctors to nurse you when you were sick. I told you that I was going to marry you to the European race, and that you would have to live together afterwards. [31]

Grey's reference to a marriage of the races was a metaphor which appealed to many Maori communities. The Muriwhenua chief Nopera Panakareao, for

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[30] Evidence of Sir Donald McLean, 6 September 1875, Le 1/1875/12. Cited in O'Malley, 'The Treaty of Ahuriri', p.9.
[31] *Te Wananga*, 29 December 1877.

example, wryly informed Robert Wynard on one occasion in the early 1850s that 'the marriage ring has not dropped from my finger'.[32] Clearly he perceived some kind of alliance or partnership with the Crown rather than a mere commercial one based on the transfer of land.

Given the rhetoric of Grey, McLean and others, Panakareao and other chiefs had strong grounds for thinking this viewpoint shared by the Crown - particularly given Grey's often generous 'flour and sugar' policy of favouring supposed land-selling tribes in the allocation of pensions and gifts - so long as land purchase negotiations continued to be conducted with some degree of care.[33] In these circumstances even the Ngati Whatua chief Te Kawau could refer to Auckland as 'the township on our land' as late as 1853 - despite seeing portions of it onsold by the Crown at more than 8,000 times the price they had received for it.[34] This mattered less than the nature of their relationship with the Crown and the fact that they had invited the settlers to Tamaki-makau-rau to live together in their common home.

The penny would drop eventually, of course, resulting in increasing Maori resistance to further land alienation as it was now understood, often combined with efforts to repudiate previous arrangements and a barrage of petitions and complaints concerning the unjust nature of these. It is tempting to suggest the 1850s as being the pivotal decade in this respect. Yet as Michael Belgrave suggests, the key change is less in terms of the Maori understanding of the arrangements entered into so much as 'the Government's increasing ability to enforce its own interpretation'.[35] From this perspective perhaps the following decade was more crucial, though such generalisations probably obscure important local variations. In the hitherto uncolonised central North

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[32] Cited in *Muriwhenua Land Report*, p.188.
[33] A. Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland: Auckland University Press/Oxford University Press, 1973, p.87.
[34] Cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim (Wai-9)*, Wellington: Waitangi Tribunal, 1987, pp.20-21.

Island, for example, Te Arawa and other iwi arguably perceived themselves as entering similar arrangments to those discussed previously as late as the 1870s.[36]

Writing with respect to the so-called 'numbered treaties' signed with the prairie nations of western Canada, Robin Fisher notes that whereas the federal government viewed these as one-off deals, extinguishing native title in return for a few specified concessions, the Indians saw them in terms of alliances 'that established an ongoing relationship subject to review'.[37] Fisher adds that the Indians probably did not understand the implications of the transfer of sovereignty enshrined in these documents or the notion of private property, but rather saw themselves as continuing to have access to the prairie lands along with the Europeans.[38]

He goes on to state that the implications of these treaties only became apparent to them from the 1880s onwards, as large numbers of settlers arrived and they found themselves increasingly marginalised in economic and social terms, confined to their reserves and prevented from hunting across prairie and woodland as they had always done.

No doubt there are some important distinctions between the comparative experiences of the prairie Indians of western Canada and those Maori tribes which signed so-called land sale deeds with the Crown in the period prior to 1865. On the face of it, however, the similarities seem striking - a point not lost on the Waitangi Tribunal, which as early as its 1987 *Orakei Report* drew comparison between the 'land treaties' of Ngati Whatua and those signed

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[35] M. Belgrave, 'Pre-emption, the Treaty of Waitangi and the Politics of Crown Purchase', *New Zealand Journal of History*, vol.31, no.1, 1997, p.37.
[36] See especially K. Rose, '"The Bait and the Hook": Crown Purchasing in Taupo and the Central Bay of Plenty in the 1870s', (an overview report commissioned by the Crown Forestry Rental Trust), 1997.
[37] R Fisher, 'With or Without Treaty: Indian Land Claims in Western Canada', in Renwick (ed.), *Sovereignty & Indigenous Rights*, p.60.
[38] ibid., p.59.

with the first nations of North America. More recently the Tribunal has moved on to consider the implications of such an approach. In its *Muriwhenua Land Report* the Tribunal summarises some of the key principles to emerge from the judicial interpretation of these North America treaties:

- The treaties should be given a fair, large and liberal construction in favour of the Indians.
- The treaties must be construed not according to the technical meaning of the words, but in the sense that they would be naturally understood by the Indians.
- As the honour of the Crown is always involved, no appearance of 'sharp dealing' should be sanctioned.
- Any ambiguity in wording should not be interpreted to the prejudice of the Indians if another construction is reasonably possible.
- Evidence by conduct or otherwise as to how the parties understood the Treaty is of assistance in giving in content.
- Oral promises form part of the Treaty too.[39]

The Tribunal goes on to state that, in its view, the same principles apply to interpreting deeds signed between Maori and the Crown, particularly in the period prior to 1865.

It seems ironic that New Zealand historiography should end up relying on North American treaty jurisprudence for a less blinkered view of the early arrangements between Maori and the Crown. Yet given the dearth of comparative historical research being undertaken on this subject - particularly in the high pressure world of treaty claims research - that may well be the outcome.

[39] Waitangi Tribunal, *Muriwhenua Land Report*, p.387.